

Michael D. Braun (167416)  
BRAUN LAW GROUP, P.C.  
12400 Wilshire Blvd., Suite 920  
Los Angeles, CA 90025  
Tel: (310) 442-7755  
Fax: (310) 442-7756

**Proposed Liaison Counsel for Lead Plaintiff  
Movant Adrian G. Mongeli and the Class**

Maya Saxena  
Joseph E. White, III  
SAXENA WHITE P.A.  
2424 North Federal Highway, Suite 257  
Boca Raton, FL 33431  
Tel: (561) 394-3399  
Fax: (561) 394-3382

Lewis Kahn  
Michael A. Swick  
KAHN GAUTHIER SWICK, LLC  
650 Poydras Street, Suite 2150  
New Orleans, LA 70130  
Tel: (504) 455-1400  
Fax: (504) 455-1498

**Proposed Lead Counsel for Lead Plaintiff  
Movant Adrian G. Mongeli and the Class**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

I.B.I. INVESTMENTS, LTD. Individually,  
And On Behalf Of All Others Similarly  
Situating,

Plaintiff,

vs.

TERAYON COMMUNICATIONS  
SYSTEMS, INC., ZAKI RAKIB, JERRY  
D. CHASE, MARK A. RICHMAN, and  
EDWARD LOPEZ,

Defendants.

**CASE NO.: 3-06-CV-03936 MJJ**

**CLASS ACTION**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION OF ADRIAN G. MONGELI TO  
BE APPOINTED LEAD PLAINTIFF  
PURSUANT TO SECTION 21D(a)(3)(B)  
OF THE SECURITIES EXCHANGE ACT  
OF 1934 AND TO APPROVE PROPOSED  
LEAD PLAINTIFF'S CHOICE OF  
COUNSEL**

**DATE: October 17, 2006  
TIME: 9:30 a.m.  
CTRM: 11, 19th Floor**

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15 U.S.C. § 78u-4(a)(3) .....	<i>in passim</i>

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House Conference Report No. 104-369, 104 <sup>th</sup> Cong. 1 <sup>st</sup> Sess. at 34 (1995), reprinted at 1995 USCC&AN730, 733 .....	1
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1 **I. INTRODUCTION**

2 Adrian G. Mongeli ("Mongeli") hereby moves to be appointed Lead Plaintiff in this action  
3 against Terayon Communication Systems, Inc. ("Terayon" or the "Company") pursuant to Section  
4 21D(a)(3)(B) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78u-  
5 4(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and for  
6 approval of its selection of the law firms Kahn Gauthier Swick, LLC ("KGS") and Saxena White  
7 P.A. ("SW") as Lead Counsel, and the Braun Law Group, P.C. ("BLG") as Liaison Counsel in this  
8 action.

9 Mongeli is precisely the type of lead plaintiff the framers of the PSLRA encouraged to  
10 participate in securities class actions by enacting the PSLRA's lead plaintiff provision. The  
11 legislative history of the PSLRA is summarized in the Statement of Managers, which noted the  
12 PSLRA was intended to increase the likelihood that sophisticated investors who have a significant  
13 interest in the underlying action, will serve as lead plaintiffs because, among other reasons,  
14 sophisticated investors with large amounts at stake "will represent the interest of the plaintiff class  
15 more effectively than class members with small amounts at stake." House Conference Report No.  
16 104-369, 104<sup>th</sup> Cong. 1<sup>st</sup> Sess. At 34 (1995), reprinted at 1995 USCC&AN730, 733. Mongeli is the  
17 type of sophisticated investor Congress sought to lead securities class actions through enactment of  
18 the PSLRA.<sup>1</sup>

19 Mongeli fully understands his duties and responsibilities to the class, and is willing and able  
20 to oversee the vigorous prosecution of this action. As described in the Certification attached to the  
21 Braun Declaration at Exhibit A<sup>2</sup>, Mongeli has suffered a loss of \$63,248.87 as a result of his  
22 purchase and/or acquisition of 413,079 shares of Terayon securities during the period October 28,  
23 2004 and March 1, 2006, inclusive (tentatively, the "Class Period"). To the best of his knowledge,  
24

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25 <sup>1</sup> If necessary, Mongeli also stands ready, willing and able to present a further detailed  
26 account of his specific attributes and abilities.

27 <sup>2</sup> Declaration of Michael D. Braun in Support of Motion of Adrian G. Mongeli to Be  
28 Appointed Lead Plaintiff Pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934  
and to Approve Proposed Lead Plaintiff's Choice of Counsel ("Braun Decl. at Ex. \_\_\_").

1 Mongeli has therefore sustained the largest loss of any qualified investor seeking to be appointed as  
 2 Lead Plaintiff. In addition to evidencing the largest financial interest in the outcome of this  
 3 litigation, Mongeli's Certification demonstrates his intent to serve as Lead Plaintiff in this litigation,  
 4 including his cognizance of the duties of serving in that role.<sup>3</sup> Moreover, Mongeli satisfies both the  
 5 applicable requirements of the PSLRA and Rule 23 of the Federal Rules of Civil Procedure ("Rule  
 6 23") and is presumptively the "most adequate plaintiff." Adrian Mongeli respectfully submits that  
 7 he should be appointed as Lead Plaintiff in this action, and that this Honorable Court should  
 8 approve his selection of the law firm of KGS and SW as Lead Counsel for the Class.

## 9 II. PROCEDURAL HISTORY

10 This case was filed on June 20, 2006, by I.B.L Investments, Ltd., individually and on behalf  
 11 of all persons or entities that purchased or otherwise acquired Terayon securities during the relevant  
 12 Class Period. The gravamen of the complaint is Defendants' violation of Sections 10(b) and 20(a)  
 13 of the Exchange Act and SEC Rule 10b-5. Specifically, the complaint arises out of Defendants'  
 14 dissemination of a series of public statements during the Class Period that contained material  
 15 misrepresentations and omitted material facts concerning Terayon's financial results, business and  
 16 operations. These misrepresentations and omissions caused the price of Terayon's securities during  
 17 the Class Period to be artificially inflated, and thereby resulted in the damages suffered by Mongeli  
 18 and the other members of the Class.

19 Shortly after the initial filing of this action, Plaintiff I.B.L. Investments, Ltd. published a  
 20 notice of pendency of that action in *The Financial Times*, an international business news service  
 21 based in the United Kingdom. See, Published Notice at Exhibit B to the Braun Declaration. That  
 22 notice advised class members of the existence of the lawsuit and described the claims asserted.

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23  
 24  
 25 <sup>3</sup> The relevant federal securities laws specifically authorize any class member seeking to be  
 26 appointed lead plaintiff to either file a complaint or move for appointment as lead plaintiff. See, 15  
 27 U.S.C. § 78u-4(a)(3)(B)(iii). A copy of Mongeli's certification of its transactions in Terayon's  
 28 securities during the Class Period is attached as Exhibit A to the Braun Declaration that has been  
 filed in conjunction with this motion.

1 Consistent with the terms of the PSLRA, Adrian Mongeli has timely filed this motion for  
2 appointment as Lead Plaintiff within 60 days from the publication of the notice of pendency of that  
3 action in *The Financial Times*.

### 4 **III. SUMMARY OF FACTS**

5 Terayon Communication Systems, Inc., a Delaware Corporation headquartered in Santa  
6 Clara, California, is in the business of developing, marketing, and selling equipment to broadband  
7 service providers for delivering broadband voice, digital video solutions ("DVS"), and data services  
8 to residential and business subscribers in the United States. During the Class Period, defendant's  
9 representations concerning the Company's financial condition, impressive income growth, and  
10 various other statements in the Company's quarterly and annual financial results and SEC filings  
11 were materially false and misleading because defendants knew or recklessly disregarded that the  
12 Company's reported financial results and growth were attributable to improper accounting practices.  
13 As a result of these materially false and misleading statements, Terayon traded at artificially inflated  
14 prices during the Class Period.

15 Unbeknownst to investors, however, at all relevant times, Terayon's internal controls and  
16 procedures and, as a result, the Company's projections and reported financial results were seriously  
17 flawed. The Company's lack of internal controls related to the preparation and review of financial  
18 statements and its seriously flawed accounting practices led to recordation of certain  
19 revenues in the wrong time periods. Terayon's own independent registered accounting firm, Ernst  
20 & Young LLP, recognized the Company's weak internal structure. The Company's continued  
21 reckless disregard for its accounting practices and the misleading information released to  
22 shareholders presented an imminent threat to the Company's cash flow and profitability.

23 On November 7, 2005, Terayon issued a press release titled "Terayon Announces  
24 Accounting Review and Delay in Release of Third Quarter Results." The release acknowledged the  
25 Company's recordation of revenues in the incorrect period, requiring a restatement of prior period  
26 financial statements. More specifically, on that day, Defendants reported that there could be "no  
27 additional assurance that Terayon or its independent auditors will not identify additional issues or  
28 other considerations in connection with the current review, and that these issues or considerations

1 will not require further adjustments to the company's prior financial results for one or more prior  
 2 fiscal years or quarters. As a result of this news, on November 8, 2005, Terayon's stock price fell  
 3 \$0.32 per share and closed at \$2.25, on unusually heavy trading volume of over 2.5 million shares.

4 Then, on March 1, 2006, the SEC announced that it had begun a formal inquiry of Terayon  
 5 in the *Bloomberg News*. The article stated that the "Santa Clara, California-based company  
 6 defaulted on its loans when it missed filing an earnings report for the quarter ended Sept. 30, 2005."  
 7 These revelations shocked the market. The next day, March 2, 2006, Terayon stock plummeted  
 8 \$0.37 per share, or 13.7% below the previous day's closing price of \$2.70, which was before the full  
 9 extent of the Company's restatement was disclosed to investors. Terayon shares closed on March 2,  
 10 2006, at \$2.25, on extremely heavy trading volume of over 4.8 million shares.

11 Defendants were motivated to and did conceal the true operational and financial condition of  
 12 Terayon, and to materially misrepresent and fail to disclose the conditions that were adversely  
 13 affecting the Company throughout the Class Period, because it: (1) enabled defendants to mislead  
 14 investors regarding Terayon's business, operations, management and the intrinsic value of  
 15 Terayon's publicly traded securities; (2) enabled defendants to publicly issue false and misleading  
 16 statements and omit material adverse information about the Company; and (3) caused Plaintiff and  
 17 other members of the Class to purchase Terayon securities with an unrealistically positive  
 18 assessment of the Company.

#### 19 IV. ARGUMENT

##### 20 A. The PSLRA Procedure For Lead Plaintiff Appointment Favors Appointment of 21 Mongeli

22 The selection of Lead Plaintiff in a securities class action is a determination made by the  
 23 Court as to which plaintiff is the most capable of adequately representing the class. The Court:

24 (s)hall appoint as lead plaintiff the member or members of the purported plaintiff  
 25 class that the court determines to be *most capable of adequately representing* the  
 interests of class members in accordance with this subparagraph.

26 15 U.S.C. §78u-4(a)(3)(B)(i) (emphasis added). The "most adequate plaintiff" assumes a  
 27 rebuttable presumption that:



1 The most adequate plaintiff in any private action arising under this subchapter is the  
2 person or group of persons that —

- 3 (aa) has either filed the complaint or made a motion in response to a notice under  
4 subparagraph (A)(i);
- 5 (bb) *in the determination of the court, has the largest financial interest in the*  
6 *relief sought by the class; and*
- 7 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil  
8 Procedure.

9 15 U.S.C. §78u-4(a)(3)(B)(iii)(I) (emphasis added).

10 Only by a showing that a Lead Plaintiff will not fairly and adequately represent the class, or is  
11 subject to unique defenses that will render such plaintiff incapable of adequately representing the  
12 class, will this presumption be overcome. 15 U.S.C. §78u-4(a)(3)(B)(iii)(II).

13 Under this statutory test, Mongeli is the “most adequate plaintiff” and should be appointed  
14 as Lead Plaintiff on behalf of the proposed class. Mongeli is exactly the type of sophisticated and  
15 interested investor with large losses that Congress intended to lead class action securities lawsuits.  
16 Mongeli has timely moved this Court for appointment as Lead Plaintiff in accordance with the  
17 PSLRA and has the willingness, resources and expertise to obtain excellent results for the class.  
18 Consequently, this Court should appoint Mongeli as Lead Plaintiff and approve his selection of  
19 KGS and SW as Lead Counsel.

20 **1. Adrian Mongeli Has Complied With The PSLRA And Should Be**  
21 **Appointed Lead Plaintiff**

22 Mongeli moves the Court to be appointed Lead Plaintiff and has timely filed the instant  
23 motion to be appointed lead plaintiff within the 60-day time period requirement. The plaintiff in the  
24 first filed action published notice on a national business-oriented wire service, on July 11, 2006.  
25 Accordingly, Mongeli meets the requirement of 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(aa) and has filed  
26 his motion by September 11, 2006.

27 Moreover, Mongeli is a sophisticated investor who has sustained a substantial loss from his  
28 investment in Terayon stock and has shown his willingness to represent the class by signing a  
certification detailing his Terayon transaction information during the Class Period. *See Braun Decl.*



1 Ex. A. As demonstrated by this certification, Mongeli is prepared to consult with counsel on a  
 2 regular basis, prior to every major litigation event, and direct the course of the litigation, with the  
 3 benefit of counsel's advice. In addition, Mongeli has selected and retained highly competent  
 4 counsel to represent the Class with significant experience in securities class action litigation. *See*  
 5 Braun Decl. at Exs. C-E.

6 **2. Adrian Mongeli Has The Largest Financial Interest of The Plaintiffs**  
 7 **Who Have Submitted Applications for Lead Plaintiff And Is Otherwise**  
 8 **Qualified To Serve as Lead Plaintiff In This Action**

9 As a result of his purchases of Terayon securities throughout the Class Period The Mongeli  
 10 has suffered losses of \$63,248.87. *See* Braun Decl. Ex. A. Mongeli believes he has the largest  
 11 financial interest in this class action compared to any other party moving for Lead Plaintiff. The  
 12 PSLRA provides that there is a rebuttable presumption that the "most adequate plaintiff" is the  
 13 plaintiff with the largest financial interest in the relief sought by the class. 15 U.S.C. §78u-  
 14 4(a)(3)(B)(iii)(I)(bb). "So long as the plaintiff with the largest losses satisfies the adequacy  
 15 requirements, he is entitled to lead plaintiff status..." *Ferrari v. Gisch*, 225 F.R.D. 599, 602 (C.D.  
 16 Cal. 2004) (*citing In re Cavanaugh*, 306 F.3d 726, 732 (9<sup>th</sup> Cir. 2002)). Mongeli, therefore, is  
 17 presumptively the "most adequate plaintiff" pursuant to the PSLRA.

18 **3. Adrian Mongeli Satisfies The Requirements Of Rule 23**

19 Section 21D(a)(3)(B)(iii)(I)(cc) of the Exchange Act, as amended by the PSLRA, provides  
 20 that the Lead Plaintiff must satisfy the typicality and adequacy requirements of Fed.R.Civ.P. Rule  
 21 23(a). *Siegall v. Tibco Software, Inc.*, 2006 U.S. Dist. LEXIS 26780, \*15 (N.D. Cal., 2006) ("In  
 22 the context of determining the appropriate lead plaintiff, the requirements of 'typicality' and  
 23 adequacy of representation are the key factors."). This Court's analysis of any other requirements of  
 24 Rule 23 as it relates to class certification should be deferred until the Lead Plaintiff moves for class  
 25 certification. *Schrivier v. Impac. Mortg. Holdings, Inc.*, 2006 Dist. LEXIS 40607, \*16 (C.D. Cal., S.  
 26 Div. 2006) ("At the lead plaintiff appointment stage, the Rule 23 inquiry is not as searching as it  
 27 would be on a motion for class certification; the prospective lead plaintiff need only make a prima  
 28 facie showing that it meets the typicality and adequacy factors."). As detailed below, Mongeli

1 satisfies both the typicality and adequacy requirements of Rule 23(a), and should therefore be  
2 appointed Lead Plaintiff in this action.

3 **a. Adrian Mongeli's Claims Are Typical Of The Claims Of All The**  
4 **Class Members**

5 Under Rule 23(a)(3), typicality exists where "the claims...of the representative parties" are  
6 "typical of the claims...of the class." The typicality requirement of Rule 23 (a)(3) is satisfied when  
7 the representative plaintiffs' claims arise from the same event or course of conduct that gives rise to  
8 claims of other class members, and when the claims are based on the same legal theory. *See Crossen*  
9 *v. CV Therapeutics*, 2005 US Dist. LEXIS 41396, \*13 (D.C. N.D. Cal., 2005). The requirement that  
10 the proposed class representatives' claims be typical of the claims of the class does not mean,  
11 however, that the claims must be identical. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9<sup>th</sup>  
12 Cir. 1988).

13 In this case, the typicality requirement is met because Mongeli's claims *are* identical to the  
14 claims of the other Class Members. Adrian Mongeli and all the members of the Class purchased  
15 Terayon securities during the Class Period when the stock prices were artificially  
16 inflated as a result of the Defendants' fraudulent misrepresentations and omissions, and thus, both  
17 Mongeli and the Class Members suffered damages as a result of these purchases. Simply put,  
18 Mongeli, like all the other Class Members, (1) purchased Terayon stock during the Class Period; (2)  
19 purchased Terayon stock at artificially inflated prices as a result of the Defendants'  
20 misrepresentations and omissions; and (3) suffered damages thereby. Mongeli's claims and injuries  
21 "arise from the same event or course of conduct that [gave] rise to the claims of other class  
22 members." *Crossen*, at \*13.

23 Moreover, Mongeli is not subject to any unique or special defenses. Thus, Mongeli meets  
24 the typicality requirement of Fed.R.Civ.P. Rule 23 because his claims are the same as the claims of  
25 the other Class Members.

26 ///

27 ///

28 ///

b. **Adrian Mongeli Will Adequately Represent The Interests Of The Class**

The Requirements of Rule 23(a)(4) relating to adequate representation are satisfied “if (1) the class counsel is qualified, experienced, and generally able to conduct the litigation; (2) the interests of the class are not antagonistic to one another; and (3) the lead plaintiff has a “sufficient interest in the outcome of the case to ensure vigorous advocacy.” *Miller v. Ventro Corp.*, 2001 U.S. Dist. LEXIS 26027, \*44 (N.D. Cal. 2001) (citing *Takeda v. Turbodyne Techs.*, 67 F.Supp. 2d 1129, 1132 (C.D. Cal. 1999)). As described below, Mongeli will adequately represent the interests of the class.

Mongeli’s interests are clearly aligned with the members of the Class because his claims are identical to the claims of the Class. There is no evidence of antagonism between his interests and those of proposed Class Members. Furthermore, Mongeli has a significant, compelling interest in prosecuting this action to a successful conclusion based upon the very large financial loss he incurred as a result of the wrongful conduct alleged herein. This motivation, combined with Mongeli’s identical interest with the members of the Class, clearly shows that Mongeli will adequately and vigorously pursue the interests of the Class. In addition, Mongeli has selected counsel that is highly experienced in prosecuting securities class actions such as this one to represent him and the class.

In sum, because of Mongeli’s common interests with the Class Members, his clear motivation and ability to vigorously pursue this action, and his competent counsel, the adequacy requirement of Fed.R.Civ.P. Rule 23(a) is met in this case. Therefore, since Mongeli not only meets both the typicality and adequacy requirements of Fed.R.Civ.P. Rule 23(a), and has sustained the largest amount of losses at the hands of the Defendants, he is, in accordance with 15 U.S.C. §78u-4(a)(3)(B)(iii)(I), presumptively the most adequate plaintiff to lead this action.<sup>4</sup>

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<sup>4</sup> The PSLRA clearly envisions a two-part test of a presumption of adequacy and a mechanism for rebutting the presumption. 15 U.S.C. §78u-4(a)(3)(B)(iii)(I) and (II). Mongeli meets the presumption of adequacy. However, there have not been any submissions to the Court which seek to rebut this presumption at this time. If any such submission can be made or is submitted to the Court, Mongeli Group would respectfully request the opportunity to address them



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Maya Saxena  
Joseph E. White, III  
SAXENA WHITE P.A.  
2424 North Federal Highway, Suite 257  
Boca Raton, FL 33431  
Tel: (561) 394-3399  
Fax: (561) 394-3382

Lewis Kahn  
Michael A. Swick  
KAHN GAUTHIER SWICK, LLC  
650 Poydras Street, Suite 2150  
New Orleans, LA 70130  
Tel: (504) 455-1400  
Fax: (504) 455-1498

**Proposed Lead Counsel for Lead Plaintiff Movant  
Adrian G. Mongeli and the Class**



1 I served the above document(s) as follows:

2 BY MAIL. I am familiar with the firm's practice of collection and processing correspondence  
3 for mailing. Under that practice it would be deposited with U.S. postal service on that same day with  
4 postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware  
that on motion of the party served, service is presumed invalid if postal cancellation date or postage  
meter date is more than one day after date of deposit for mailing in an affidavit.

5 I declare declare, pursuant to Civil L.R. 23-2, that on the date hereof I served a copy of the  
6 above-listed document(s) on the Securities Class Action Clearinghouse by electronic mail through the  
following electronic mail address provided by the Securities Class Action Clearinghouse:

7 scac@law.stanford.edu

8 I further declare that I am employed in the office of a member of the bar of this Court at whose  
9 direction the service was made.

10 I further declare under penalty of perjury under the laws of the United States that the above is  
true and correct.

11 Executed on September 11, 2006, at Los Angeles, California 90025.

12  
13  
14 /S/ LEITZA MOLINAR  
Leitza Molinar